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## Copyright—Fair Use—Federal Rules

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(2) that a statute, especially a criminal statute, must have been directed toward acts within the contemplation of the legislature when enacted.<sup>15</sup> There is considerable force to the first branch of the dissent when it is remembered that Art. I, including section 2, deals with the organization and powers of Congress and not, as do some other provisions of the Constitution, with individual rights and privileges as such.<sup>16</sup> So too, the second branch of the dissent is in keeping with the desirable policy of narrowly construing criminal statutes rather than extending their text beyond their context at the time of enactment.<sup>17</sup>

J. E.

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COPYRIGHT—FAIR USE—FEDERAL RULES—[Federal].—Plaintiff, the New York Herald-Tribune, editorially defended Wendell L. Willkie, the Republican presidential candidate, against charges that he was closely associated with Wall Street. In a communication to the newspaper, defendant, Otis & Company, reprimanded it for assuming that any affiliation was to be disavowed. This letter was acknowledged but never referred to in the newspaper. Thereupon the defendant addressed a circular letter to a select list of public officials, bankers, educators, economists, and other persons, enclosing a photostatic copy of the editorial page, including the masthead, of plaintiff's copyrighted newspaper. Plaintiffs brought an action for alleged infringement of copyright and trademark. The defendant filed motions to dismiss and for judgment on the pleadings, supported by affidavits claiming "fair use" of the copyrighted material. *Held*: The determination of "fair use" is not to be decided on motion and affidavits, but is to be left to the trial judge on the merits of the case. *New York Tribune v. Otis & Company*.<sup>1</sup>

The Federal Rules of Civil Procedure, Rule 56(b),<sup>2</sup> permit some objections to the contentions of an opposing party to be raised by a motion for summary judgment supported by affidavits. The decision in the instant case, however, goes no further than to hold that "fair use" is a defense of such complexity, and so dependent upon particular facts, that it can be raised only by answer and proved only in a full trial before judge or jury.

The decision seems reasonable, when the vagueness of the conception

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15. See *United States v. Gradwell* (1917) 243 U. S. 476 in which the court held that conspiracies to defraud in a primary election are not within the purview of §19 of the Criminal Code, because when §19 was passed by Congress, primary elections were unknown in the law.

16. U. S. Const. Amend. XIV. See *Nixon v. Herndon* (1927) 273 U. S. 536; *Nixon v. Condon* (1932) 286 U. S. 73; note 12, supra; U. S. Const. Amend. XV. See *Guinn v. U. S.* (1915) 238 U. S. 347, note 12, supra. These cases were thus distinguished by Mr. Justice Douglas in dissent, 61 S. Ct. 1030, 1046.

17. *McBoyle v. U. S.* (1931) 283 U. S. 25.

1. (D. C. S. D. N. Y. 1941) 39 F. Supp. 67.

2. "FOR DEFENDING PARTY. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

"fair use"<sup>3</sup> is taken into account. Under the constitutional grant<sup>4</sup> to Congress of power to secure to authors an exclusive right to their writings, and under the statutes<sup>5</sup> which Congress has enacted in the exercise of that power, authors are assured of protection against "piracy" or wholesale unauthorized reproduction of their works. Nevertheless, at the other extreme, in everyday intercourse some unauthorized republications necessarily occur. The doctrine of "fair use"<sup>6</sup> has been developed in an effort to sift from among such publications those which are detrimental to the author's rights.<sup>7</sup> The rest are not treated as infringements.<sup>8</sup>

The determination of "fair use" depends upon the facts of each case.<sup>9</sup> If the object of the reviewer be a critical evaluation, the law permits a sufficient copying and publication to show the merits or demerits of the work in order to give a correct impression.<sup>10</sup> It has been held, for example, that subsequent writers may quote,<sup>11</sup> review,<sup>12</sup> and criticize<sup>13</sup> without in-

3. "A copyrighted work is subject to fair criticism, serious or humorous. So far as it is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. It is not always easy to say where the line should be drawn between the use which for such purposes is permitted and that which is forbidden." *Hill v. Whalen and Martell, Inc.* (D. C. S. D. N. Y. 1914) 220 Fed. 359, 360.

4. U. S. Const. Art. I, §8: "The Congress shall have power: \* \* \* To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

5. (1831) 4 Stat. 436, c. 16; (1856) 11 Stat. 138, c. 169; (1870) 16 Stat. 198, c. 230; (1909) 35 Stat. 1075, c. 320, 17 U. S. C. A. §1.

6. The strict meaning of "fair use" is "a use technically forbidden by the law, but allowed as reasonable and customary, on the theory that the author must have foreseen and tacitly consented." De Wolf, *An Outline of Copyright* (1925) 143.

7. *Sampson & Murdock Co. v. Seaver-Radford Co.* (C. C. A. 5, 1905) 140 Fed. 539; *West Pub. Co. v. Edward Thompson Co.* (C. C. E. D. N. Y. 1909) 169 Fed. 833, modified in (C. C. A. 2, 1910) 176 Fed. 833; *Stephens v. Howells Sales Co.* (D. C. S. D. N. Y. 1926) 16 F. (2d) 805; *Henry Holt & Co. v. Liggett & Meyers Tobacco Co.* (D. C. E. D. Pa. 1938) 23 F. Supp. 302. *Amdur, Copyright Law and Practice* (1936) 775, c. 22, §13 on the limits of "fair use."

8. *Harper v. Shoppel* (C. C. S. D. N. Y. 1886) 26 Fed. 519; *Hill v. Whalen & Martell, Inc.* (D. C. S. D. N. Y. 1914) 220 Fed. 359; *G. Ricordi & Co. v. Mason* (C. C. S. D. N. Y. 1911) 201 Fed. 182, aff'd (C. C. A. 2, 1913) 210 Fed. 277; *Broadway Music Corp. v. F-R Pub. Corp.* (D. C. S. D. N. Y. 1940) 31 F. Supp. 817.

9. *Sims v. Stanton* (C. C. N. D. Cal. 1896) 75 Fed. 6. See *Folsom v. Marsh* (C. C. D. Mass. 1841) Fed. Cas. No. 4901.

10. The view that a writer may copy to a reasonable extent in order to give a correct idea of the whole is enunciated in: *Story v. Holcombe* (C. C. D. Ohio 1847) Fed. Cas. No. 13,497; *Lawrence v. Dana* (C. C. D. Mass. 1869) Fed. Cas. No. 8136.

11. *G. Ricordi & Co. v. Mason* (C. C. S. D. N. Y. 1911) 201 Fed. 182, aff'd (C. C. A. 2, 1913) 210 Fed. 277; *Hill v. Whalen & Martell, Inc.* (D. C. S. D. N. Y. 1914) 220 Fed. 359; *Broadway Music Corp. v. F-R Pub. Corp.* (D. C. S. D. N. Y. 1940) 31 F. Supp. 817. See *Folsom v. Marsh* (C. C. D. Mass. 1841) Fed. Cas. No. 4901; *Lawrence v. Dana* (C. C. D. Mass. 1869) Fed. Cas. No. 8136.

12. *Bloom & Hamlin v. Nixon* (C. C. E. D. Pa. 1903) 125 Fed. 977, where parody within the limits of "fair use" is accepted as a form of review;

curring liability for infringement. Such permitted use, however, is subject to the general limitation that the republication must not be so extensive as to substantially injure the original work<sup>14</sup> and must be for some legitimate purpose.<sup>15</sup> The natural question whether the defendant's intention has any significance in cases of "fair use," cannot be dogmatically answered. Some authorities hold that a mere want of intention to infringe is not a defense,<sup>16</sup> but there are *dicta* indicating that the defendant's intention is to be considered in determining whether a "fair use" has been made.<sup>17</sup>

In the recent case of *Broadway Music Corp. v. F-R Pub. Corp.*,<sup>18</sup> the District Court of New York had occasion to review rather fully the factors to be considered in determining whether the defendant had established a valid defense of "fair use." The court in that case held that the publication of part of the plaintiff's copyrighted song "Poor Pauline" in connection with the passing of the once famous actress Pearl White was a "fair use." It considered, in arriving at this result, the following factors: (1) the extent and relative value of the extracts; (2) purpose and whether quoted portions might be used as a substitute for the original work; (3) the effect upon the distribution and objects of the original work. It may well be

G. Ricordi & Co. v. Mason (C. C. S. D. N. Y. 1911) 201 Fed. 182, *aff'd* (C. C. A. 2, 1913) 210 Fed. 277. Amdur, *Copyright Law and Practice* (1936) 754, c. 22, §7.

13. Harper v. Shoppel (C. C. S. D. N. Y. 1886) 26 Fed. 519. Hill v. Whalen & Martell, Inc. (D. C. S. D. N. Y. 1914) 220 Fed. 359. In Folsom v. Marsh (C. C. D. Mass. 1841) Fed. Cas. No. 4901, at 344, the court said: "Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use passages for purposes of fair and reasonable criticism."

14. The court, in Lawrence v. Dana (C. C. D. Mass. 1869) Fed. Cas. No. 8136, at 61, said: "The purpose of fair use is to limit privileges so that it shall not be exercised to an extent to work substantial injury to the property which is under the legal protection of copyright." The following limitation is, apparently, recognized: "However the reduction in demand due to criticism, and not to the excessive quotations, constitutes no cause of action for copyright infringement." Amdur, *Copyright Law and Practice* (1936) 777. The authority cited is Hill v. Whalen and Martell, Inc. (D. C. S. D. N. Y. 1914) 220 Fed. 359.

15. Note 8, *supra*.

16. Buck v. Jewell-LaSalle Realty Co. (1931) 283 U. S. 191; Fishel v. Lueckel (C. C. S. D. N. Y. 1892) 53 Fed. 499; Witmark & Sons v. Calloway (D. C. E. D. Tenn. N. D. 1927) 22 F. (2d) 412; Pathe Exchange v. Internat'l Alliance, etc. (D. C. S. D. N. Y. 1932) 3 F. Supp. 63; Johns & Johns Printing Co. v. Paull-Pioneer Music Corp. (C. C. A. 8, 1939) 102 F. (2d) 282; Advertisers Exchange v. Laufe (D. C. W. D. Pa. 1939) 29 F. Supp. 1.

17. Lawrence v. Dana (C. C. D. Mass. 1869) Fed. Cas. No. 8136. The court said at page 60: "Evidence of innocent intention may have a bearing upon the question of 'fair use.'" Amdur, *Copyright Law and Practice* (1936) 781, cites the aforementioned case and states the rule as follows: "While it is not required to prove that the infringement was committed intentionally \* \* \* evidence of innocent intention does enter into the determination whether a use made of a copyrighted work was a fair one." The principal case also refers to *Lawrence v. Dana* as authority for the proposition that intent is to be considered in determining whether "fair use" is present.

18. (D. C. S. D. N. Y. 1940) 31 F. Supp. 817.

questioned whether the daily newspaper published by the plaintiff in the instant case suffered harm under any of these tests, since its claim upon public interest is merely temporary. Nevertheless, the court had difficult issues of fact before it and acted correctly in reserving to the plaintiff the right of cross-examination and other safeguards given in a trial for the purpose of determining the facts.

N. B. K.

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EVIDENCE—INFERENCE UPON AN INFERENCE—[Missouri].—Plaintiff sued defendant insurance company on a double indemnity, or accidental death benefit, provision in a life insurance policy. Plaintiff contended that the insured died as a result of an accidental fall from a stepladder which caused a rupture of the spleen. Although there were no eyewitnesses to the fall, there was evidence to the effect that on the night of the alleged accident, the insured had been putting up colored bulbs in front of his house with the aid of a stepladder. The stepladder was found the next day with one of the legs broken off. A splinter of wood, allegedly from the ladder, was taken out of the insured's leg. Plaintiff testified that on the day after the fall, insured showed her bruises on his chest, over his heart, and on his leg and that there were also bruises along his left side, and discoloration over his abdomen. Insured's doctor testified, that in his opinion, insured died as a result of a rupture of the spleen. Insured had been active, energetic, and in apparent good health for some time prior to the injury. Defendant contended that the evidence presented was insufficient; that plaintiff could not establish her case without building an inference upon an inference,<sup>1</sup> which defendant contended was not permitted. *Held*: That the rule against building an inference upon an inference has been modified to the extent that it is now permitted in order to arrive at a conclusion, so long as the result is not too remote. *Krug v. Mutual Life Insurance Co. of New York*.<sup>2</sup>

Until very recently, the Missouri court has refused to recognize that an inference might be based upon an inference in order to prove an ultimate fact.<sup>3</sup> Rather, it has invariably said that the "piling" of inferences would not be permitted. On the other hand, there seems to have been no limit to

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1. The defendant contended that plaintiff must show (1) that insured was standing on the ladder on the particular night, (2) while thereon he was caused to fall by the accidental breaking of the ladder, (3) that he sustained bodily injuries as a result of the breaking of the ladder and the fall, (4) that the bodily injuries were evidenced by visible contusions or wounds on the body as required by the insurance policy, and (5) that as a result of such bodily injuries, and independently and exclusively of all other causes, the insured died. It was argued by the defendant that each of these steps was an inference and had to be proved by fact and not established by inferences drawn from previous inferences.

2. (Mo. App. 1941) 149 S. W. (2d) 393.

3. *Wright v. Order of United Commercial Travelers of America* (1915) 188 Mo. App. 457, 174 S. W. 833; *Atherton v. Railway Mail Ass'n* (Mo. App. 1920) 221 S. W. 752; *Phillips v. Travelers' Ins. Co.* (1921) 288 Mo. 175, 231 S. W. 947; *Cardinale v. Kemp* (1925) 309 Mo. 241, 274 S. W. 437; *Harding v. Federal Life Ins. Co.* (Mo. App. 1931) 34 S. W. (2d) 198;